UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 28

WYNN LAS VEGAS, LLC

Case No. 28-CA-22818

and

RONDA LARSON, an Individual

RESPONDENT WYNN LAS VEGAS, LLC'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S LIMITED CROSS EXCEPTIONS

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I. INTRODUCTION.

Pursuant to Section 102.46(f) of the Board's Rules and Regulations, Respondent Wynn Las Vegas, LLC (hereinafter "Wynn" or "Respondent") files this Answering Brief to the Acting General Counsel's Limited Cross-Exceptions to the Decision of Administrative Law Judge James M. Kennedy (hereinafter "ALJ") issued on December 14, 2010. Respondent previously filed exceptions of its own on February 11, 2011, asserting that the ALJ erred by finding that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging employee Ronda Larson, and suspending employee David Sackin (hereinafter "Sackin").

As set forth herein, Respondent submits that the ALJ's finding that Respondent did not violate the Act by questioning Sackin about the Labor Commissioner proceeding was appropriate, proper, and fully supported by the credible record evidence.

II. FACTUAL BACKGROUND.

Sackin is currently employed by Wynn as a Table Games Dealer. As discussed in more detail in Wynn's Brief in Support of its Exceptions, several of Wynn's table games dealers filed complaints with the Nevada Labor Commissioner alleging that Wynn's tip pooling procedure violated Nevada law. On July 1, 2009, prior to the commencement of the hearing before the Labor Commissioner, counsel for the dealers were required to provide Wynn's counsel with an initial list of witnesses (twenty-four (24)) that they intended to call to testify during the hearing. (J. Ex. 1) The majority of these witnesses were current employees of Wynn, many of whom were not believed to be represented by counsel for the dealers. It is important to note that at the time of the Labor Commissioner hearing, Wynn and the Transport Workers Union of America (hereinafter "the Union") had entered into a tentative Collective Bargaining Agreement. (R. Ex. 17) Accordingly, there was no dispute over the fact that the Union was the exclusive collective

Agreement. <u>Id.</u> The representation at issue before the Labor Commissioner was whether dealers were represented by *legal counsel* unrelated to their Union representation. The Union was neither a party to nor a participant in the proceedings before the Nevada Labor Commissioner.

Nevada Labor Commissioner proceedings provide for limited discovery. See NAC 607,300, et seq. Therefore, in preparation for presenting its case in chief, Wynn's counsel determined it was necessary to meet with the witnesses, identified through the limited discovery process, to determine first whether they were aware that they were on the witness list, and secondly the subject matter of their testimony. (Collura: TR 50, Il. 13-23) Ms. Collura was tasked with meeting with the witnesses, both CSTLs and dealers. Id. As Ms. Collura testified, Sackin was one of the only dealers available on the day shift who was not believed to be represented by counsel in the Labor Commissioner proceeding. (Collura: TR 51, ll. 4-10) On August 10, 2009, Ms. Collura, along with Tyrone Lancaster, the Assistant Casino Administration Manager for Encore, met with Sackin in Ms. Collura's office. (Collura: TR 48, ll. 12-22) Because Sackin was unsure of the nature of the meeting, Ms. Collura immediately assured him that the meeting was not disciplinary in nature and that no discipline would arise from the meeting. (Collura: TR 53, ll. 17-22; TR 55, ll. 6-9; Sackin: TR 457, ll. 6-9) Sackin asked if he needed a Weingarten representative, and Ms. Collura assured him again that this was not a disciplinary meeting and that he had done nothing wrong. (Collura: TR 53, l. 24 – 54, l. 4) Ms. Collura then inquired if Sackin was represented by counsel in the matter before the Labor Commissioner. (Collura: TR 55, ll. 12-24) Mr. Sackin stated that he was not. (Collura: TR 56, 1. 1) Ms. Collura next informed Sackin that his name was on the list of possible witnesses for the Labor Commissioner proceeding, and asked whether he was aware that his name was on the list. (Collura: TR 56, 1, 2-8) Sackin acknowledged that he was aware that his name was on the list. (Collura: TR 56, 1. 9-10) Ms. Collura explained to Sackin that she was meeting with the potential witnesses to assist in the preparation of the case to determine the subject of their testimony. (Collura: TR 56, l. 11-16) Sackin indicated that he had not spoken with anyone about the Labor Commissioner proceeding and did not know what, if anything, he would be testifying about. (Collura: TR 56, l. 25 - 57, l. 2; Sackin: TR 458, ll. 17-18) Ms. Collura next asked about tipping, and whether Sackin had ever seen a CSTL receive a tip. (Collura: TR 57, 1. 19-23) An issue in dispute at the Labor Commissioner hearing was whether, and to what extent, Floor Supervisors and subsequently CSTLs received patron gratuities before and after the change in the gratuity policy. The subject of the meeting then turned to more social conversation, as Sackin and Mr. Lancaster begun discussing automobiles. (Collura: TR 60, l. 19-23; Lancaster: TR 354, Il. 16-21) At no time did Ms. Collura ever discuss the union or inquire into Sackin's union activity. (Collura: TR 60, 1. 25 - 61, 1. 1) In fact, by the Counsel for the General Counsel's own admission, Ms. Collura agreed with Sackin that the tip pooling litigation was an entirely separate matter from the Union. See CGC Brief at 3. At this point in time, the entire issue of tip distribution was fully negotiated and the subject of an executed tentative agreement. (R. Ex. 17 at 17-18) The Labor Commissioner proceeding was solely for the purpose of determining the legality of the tip pooling procedure under Nevada law both before and after the tentative agreement was reached. The Counsel for the General Counsel cites to Sackin's testimony that Ms. Collura had commented that there was "no reason to get a third party involved that may take a portion of that money because there's already representation." See CGC Brief at 4. Respondent does not concede that such a statement was made. Indeed, Sackin made several incorrect representations. Most notably, as addressed by the ALJ, Sackin stated

that Lancaster was introduced as a company lawyer. See Decision at 13, n.18. Sackin fabricated that comment in a flagrant attempt to bolster his case. The statement attributed to Ms. Collura regarding involving a third party, if believed to be accurate, does not imply that Ms. Collura was questioning Sackin about his union activity. To the contrary, the statement, when taken in context, clearly indicates that Ms. Collura was acknowledging the Union's representative status and that Sackin did not need outside lawyers that would take a portion of the money on contingency. The "third party" was not the Union, it was the attorneys that the dealers hired to file suit against Wynn.

III. LEGAL ARGUMENT.

The ALJ correctly analyzed the meeting with Sackin under the provisions of <u>Johnnie's Poultry Co.</u>, 146 N.L.R.B. 770 (1964). He correctly found that the Board's witness protection rules were not applicable to a proceeding before another government agency with its own set of witness protections. Decision at 13.

Counsel for the General Counsel asserts that putting aside <u>Johnnie's Poultry</u>, Ms. Collura still unlawfully interrogated Sackin about his union activity. Such an assertion is entirely unsupported by the record. To the contrary, the record provided that the August 10, 2009 meeting was solely to discuss the Labor Commissioner proceeding, and had no bearing on Sackin's union activity. The questioning consisted entirely of whether he was aware that he may be called to testify in a proceeding before the Nevada Labor Commissioner over the issue of tip pooling, and whether he had any knowledge of tipping and disciplinary practices of CSTLs. (Collura: TR 55-57) Nothing in this questioning involved Sackin's own, or anyone else's, protected concerted activity.

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Even if the questioning was somehow related to Sackin's protected concerted activity, the Board has historically found that an employer is entitled to inquire into such activity on a limited basis:

The Board and courts have recognized that not all employer inquiry concerning union and protected concerted activity constitutes illegal interrogation. Thus, an employer or his counsel is privileged to interview employees to prepare his defense or to inform himself as to the validity of a union's majority claim, or to discover violations of plant rules. The privilege is not, however, unqualified and must not be exercised in an arbitrary manner. Thus, the inquiry must be limited to the necessities of the situation, must be accompanied by assurance that the employee will suffer no reprisals as a result of his responses, and must occur in a context free from employer hostility to union or concerted activity.

Alton Box Board Co., 155 N.L.R.B. 1025, 1040-41 (1965). The Board subsequently established a three-part test to determine if the questioning was unlawful:

[T]he appropriate analysis is the following three-part test. First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act.

Guess?, Inc., 339 N.L.R.B. 432, 434 (2003). In the instant matter, each of these three parts are met. The questions asked of Sackin were clearly relevant to the matter before the Labor Commissioner. The questions did not seek personal information about Sackin's union activity or any protected concerted activity and thus did not have an illegal objective. Finally, Sackin had no confidentiality interests at all in discussing his experiences in general with CSTLs receiving tips or issuing discipline. Accordingly, no violation of the Act is present.

Contrary to the Counsel for the General Counsel's assertions, the record is devoid of any evidence that Ms. Collura's comments to Sackin suggested that he was expected to testify a particular way or face reprisal. Even the cases cited by Counsel for the General Counsel are inapposite as they all involve situations where the employee was required to choose the employer

over the union. Inasmuch as the Union was not even a party to the Labor Commissioner proceeding, whichever way Sackin testified in the Labor Commissioner proceeding was inconsequential to his union activity or affiliation. The outcome of that proceeding provides the most telling evidence: the Labor Commissioner found Wynn's tip pooling procedures lawful, see Smith, et al. v. Wynn Las Vegas, LLC, Nevada State Labor Commissioner (July 12, 2010), http://media.lasvegassun.com/media/pdfs/blogs/documents/2010/07/12/wynnruling0710.pdf, and Wynn is party to a ratified Collective Bargaining Agreement with the Union.

IV. CONCLUSION.

The ALJ correctly found that Ms. Collura's interview of Sackin was not an unlawful interrogation as it had no relation to his protected concerted activity. Counsel for the General Counsel has once again exaggerated the record in an attempt to create evidence that simply does not exist. The General Counsel would like the Board to think that Sackin suffered some hostile interrogation whereby he was threatened to name names and swear his allegiance or suffer the consequences. This portrayal is entirely disingenuous. The fact of the matter, as the ALJ correctly concluded based on the record before him, was that the conversation was cordial, specifically addressed the Labor Commissioner proceeding, and made no reference to either Sackin's or any other employee's protected concerted activity.

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Based on the foregoing, the Respondent respectfully requests the Board uphold the finding of the ALJ dismissing the allegations in Paragraphs 5(a) – (e) of the Complaint, finding that Respondent did not unlawfully interrogate Sackin.

DATED this 21st day of March, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of March, 2011, the undersigned, an employee of Kamer Zucker Abbott, electronically filed the foregoing RESPONDENT WYNN LAS VEGAS, LLC'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S LIMITED CROSS EXCEPTIONS, via the National Labor Relations Board E-Gov Electronic Filing system, and placed a copy of the Brief in the United States mail, postage prepaid, and addressed as follows:

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